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For participants only

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Provisional summary record of the 3440th meeting
Held at the Palais des Nations, Geneva, on Tuesday, 31 July 2018, at 3 p.m.

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.05 p.m.

Immunity of State officials from foreign criminal jurisdiction (agenda item 3) (*continued*) (A/CN.4/722)

Ms. Galvão Teles said that she would like to thank the Special Rapporteur for her sixth report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/722). Although only of a preliminary character, the report and the plenary debate would allow the Commission to continue to make progress on an important, yet sensitive, topic. As the work begun by the Special Rapporteur on the analysis of the procedural aspects of immunity in the sixth report would be finalized in the seventh report and proposals for draft articles would be submitted in 2019, her comments, too, would be merely preliminary in nature and subject to a complete analysis of the procedural aspects of immunity, which would be possible only the following year.

The issues related to the procedural aspects of the recognition of immunity of State officials were largely absent in the literature and in international instruments that dealt with immunities, which tended to focus on the substantive dimension of the concept. Consequently, that part of the work of the Commission on the topic was particularly important. It was also of particular relevance since the procedural aspects and safeguards contributed to achieving the necessary balance between the different values and interests at stake, namely the sovereign equality of States and the stability of international relations, respect for the jurisdiction of the forum State, the fight against impunity and the individual rights of the officials concerned.

She would begin with some general remarks on the three procedural aspects of immunity treated in the report: the temporal, or timing, element; the material element; and competence for the determination of immunity. She would then turn to possible subjects for further discussion the following year that had been identified in paragraphs 24, 35, 36, 41 and 109 of the report involving procedural aspects of immunity that related to the role of the State of nationality of the official and the possibility of prosecution in that State. In addressing those aspects, she would also refer, as appropriate, to a recent case decided in the Portuguese courts that pertained to the issues covered in the sixth report and those expected to be dealt with in the seventh report, which could be of relevance to the Commission's discussions on the procedural aspects of immunity. In that case, the Court of Appeal of Lisbon had, on 10 May 2018, issued a decision on criminal proceedings against a former Vice-President of Angola involving the topic of immunity from criminal jurisdiction and a request for the transfer of proceedings to the State of nationality of the official.

With respect to the timing element, or the issue of when immunity should be considered, which was covered in paragraphs 49 to 63 of the report, the Special Rapporteur discussed the moment in the proceedings when the competent authorities of the foreign State should consider the existence of immunity of State officials and make a decision in that regard. The main international instruments dealing with State or diplomatic immunities were silent on the question of the moment when immunity should be considered, as were most national laws on immunity.

She agreed with the Special Rapporteur that, given that the nature of immunity was to prevent the exercise of jurisdiction by a State over officials of foreign States, a decision on the applicability of immunity to a defendant must be adopted as early as possible in the proceedings and, in any case, always before the adoption of any binding decision or coercive measure against the State official. As the Special Rapporteur pointed out, that conclusion was supported by international case law; there was also relevant national judicial practice.

Difficulties could arise, however, regarding the applicability of the rules of immunity of State officials to the investigation phase of criminal proceedings in the forum State, particularly due to the diversity of national models of investigation and prosecution. Nevertheless, it was true for most systems that, during the investigation phase, State authorities were still trying to determine which acts and persons might be involved in a crime and could potentially be subject to criminal proceedings. It was only when a person was indicted or identified as a suspect at the final stage of an investigation, or when the

competent authorities intended to apply coercive measures in the context of an investigation, that the person came under the criminal jurisdiction of the State. Accordingly, it was only at those moments in the investigation that the suspect's capacity as a State official and the enjoyment of immunity from jurisdiction should be considered. As the Special Rapporteur pointed out, such a position found support in the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*. Furthermore, it should be noted that, in several cases, the performance of investigatory acts could be of fundamental importance in deciding whether a State official should be awarded immunity in a given case. That was particularly true in cases involving functional immunity, in which the competent authorities must first determine whether an agent was a State official and whether the relevant acts were performed in an official capacity before taking a decision on the enjoyment of such immunity.

Lastly, if a crime could not be investigated because of the mere suggestion that a foreign State official could be implicated, immunities would be absolute, and it would never be possible to apply the exceptions to immunity provided for in the draft articles for the commission of the most serious international crimes.

Turning to the material element, concerning the acts of the forum State that were affected by immunity, which the Special Rapporteur analysed in paragraphs 64 to 96 of the report, she pointed out that, as a general rule, it was proposed that acts that were characteristic of the exercise of criminal jurisdiction by the State were affected by immunity. Those included acts performed by or before criminal courts such as an indictment, a summons to appear before the court as a suspect or accused, a detention or arrest order or an extradition order. Such a proposal appeared to be supported by international conventions that stipulated that certain categories of persons were inviolable and could not be subject to any form of arrest or detention, or any measure of enforcement. However, it might be that not all but only certain types of acts related to the exercise of criminal jurisdiction necessarily affected the immunity of State officials.

In the above-mentioned case decided by the Court of Appeal of Lisbon, the Court had addressed one of the arguments in favour of immunity raised by the accused, who had claimed that, even though he no longer enjoyed personal immunity at the time of the appeal since he was no longer in office, he had enjoyed such immunity throughout his time in office and that it covered all his acts, both private and official, including those performed before he had taken office. As a consequence, the defendant had argued that all acts of the relevant authorities in the criminal proceedings between the initiation of the investigation and the expiry of his term of office had been in violation of his immunity and should be considered as null.

The Court had rejected that reasoning. It had highlighted that immunities of State officials, as recognized by international law, constituted an exception to the general principle that a State had full jurisdiction over its territory. Such immunities were justified by the need to guarantee the sovereign equality of States and to allow State officials to perform their functions freely and effectively. Therefore, limitations on the jurisdiction of each State and its right to try a foreign Head of State who violated its criminal law should be placed only to the extent necessary to allow that Head of State to fulfil his or her functions without external interference. To allow for other exceptions might affect State equality and the independence of the forum State.

The Court had considered that acts against a serving foreign Head of State such as court orders, coercive measures, acts or measures to collect evidence or the issuing of indictments, were prevented by immunity rules. However, all other acts performed in the course of criminal proceedings that did not entail measures such as the bringing of a criminal complaint, the opening of investigations, the collection of evidence or the issuing of an indictment, did not have any direct influence *per se* on the exercise of the functions of that Head of State and were not covered by immunities from jurisdiction. The Court had found no indication in the proceedings of any act that might constitute a violation of the immunity of the Vice-President during his term of office. In summary, the Court of Appeal of Lisbon had held that only certain acts performed in the course of criminal proceedings

were affected by immunities of State officials and that the test should be to determine which acts could interfere with the exercise of their official functions.

As to the determination of immunity, addressed in paragraphs 97 to 108 of the report, there seemed to be no question regarding the competence of the forum State to determine whether immunity from criminal jurisdiction applied in a given case. As a rule, the courts of the forum State, as jurisdictional organs, would be competent to decide whether they could exercise their jurisdiction or whether immunity rules applied. In some jurisdictions, other organs of the State might intervene in that determination. That was the case, for instance, when the Government issued an opinion to the courts on whether or not a foreign official enjoyed immunity. That was not the case, however, in many jurisdictions, including in Portugal, where there was no such role for the Government.

As to the State of nationality, it often intervened in the proceedings initiated against its officials abroad and also played a role in the determination of immunity. The extent to which it could intervene in that determination and in the development of the proceedings seemed to be, however, more controversial. A well-established option through which the State of nationality could intervene in the proceedings initiated abroad against one of its officials was through the issuing of a waiver of immunity. It was generally agreed that, because the purpose of granting immunities to State officials was not to protect the individuals but the State that they represented and its sovereignty, it was for the State to claim or to waive immunity for its officials. If a State chose to intervene in proceedings abroad in order to waive the immunity that would be enjoyed by one of its officials — namely, because it considered that the acts in question should not be protected — the official had no defence and could face trial for his or her actions.

In certain cases, the determination of the existence of immunity might pose difficulties, particularly when functional immunity was at stake. In such cases, she agreed that the courts would usually need to obtain more information regarding the official, his or her function and the nature of the alleged acts. Other organs of the forum State could provide that information but the best source would often be the State of nationality of the official.

As the Special Rapporteur pointed out, there were no international rules or decisions by international courts related to the validity and relevance of the information provided by the State of nationality of the official regarding the official's status and the official nature of acts performed by the official. However, relevant considerations could be found in the advisory opinion of the International Court of Justice on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*. The Court had clarified that a finding of immunity by the Secretary-General "creates a presumption which can only be set aside for the most compelling reasons" and that it must be given "the greatest weight by national courts", thus creating a balance between the interests of the forum State and those of the United Nations.

By applying the same rule to the question of immunity of State officials, it could be argued that a balance between the interests of the forum State and the State of nationality required the courts of the forum State to give great weight to the opinion issued by the State of nationality concerning the quality of the official functions performed by its official abroad but permitted the courts to disregard that opinion if solid information to the contrary was obtained. Nevertheless, care should always be taken to distinguish, for the above-mentioned purposes, whether the claim to immunity was based on international law, conventional or customary, or merely on the domestic law of the State of nationality, which was not binding upon the forum State.

It was worth recalling the decision of the Lisbon Court of Appeal, which had dismissed the claim that the immunities rules established in the Constitution of Angola granting the Vice-President immunity for five years from the date of expiry of his term of office should be equally applied to the Portuguese courts.

Turning to an issue that had been identified but not yet developed by the Special Rapporteur, she said that the State of nationality of the official might wish to prosecute the official for his or her actions in its own courts. In that case, the question arose as to whether the State of nationality should have preference in exercising jurisdiction over its officials

and whether the person in question should be extradited, upon request, for that purpose, or, if the person was not in the custody of the forum State, the proceedings should be transferred to the State of nationality of the official.

Some authors had proposed that horizontal enforcement of international criminal law, although both necessary and desirable in certain cases, should comply with the principle of subsidiarity. According to that view, the courts of the third State should consider, when assessing their own jurisdiction, whether there was a reasonable prospect that the defendant's conduct would be the subject of a genuine investigation in his or her home jurisdiction.

National legislation and case law in certain States also supported the application of the subsidiarity principle in prosecutions of foreign officials. For instance, in Spain, although universal criminal jurisdiction could be exercised under certain conditions, the law required that courts generally deferred to ongoing or impending foreign national prosecutions in the territorial State of the crime, unless, as a Spanish court had found, serious and reasonable proof of judicial inactivity demonstrated a failure, whether of will or of capacity, to effectively prosecute the crimes.

Similarly, certain international crimes were subject to the universal jurisdiction of German courts; however, the German Federal Prosecutor would exercise that jurisdiction only if the competent authorities of the territorial State or of the State of nationality did not carry out a genuine investigation and a competent international tribunal did not pursue the case. In a case brought by Iraqi nationals against a former United States Secretary of Defense and other United States military officials for alleged torture at the Abu Ghraib prison in Iraq, the Federal Prosecutor of Germany had argued that the crimes were already under investigation by United States authorities, which had had a closer connection with those events, and therefore the principle of subsidiarity would not permit the German authorities to investigate the complaint.

The application of the principle of subsidiarity in criminal prosecutions was also required by Belgian and Swiss law and was applied as a prudential doctrine by courts in Austria, the United Kingdom, Denmark, Norway and Switzerland.

Furthermore, the idea of subsidiarity found expression in the principle of complementarity established in article 17 of the Rome Statute of the International Criminal Court, pursuant to which the Court could investigate a matter only if a State was genuinely unable or unwilling to investigate and prosecute. That principle was considered to promote a balance between State sovereignty and the pursuit of international justice.

The introduction of a similar principle in the context of the exercise of criminal jurisdiction by foreign courts over officials of third States might be useful to strike that same balance. Even in those cases in which immunity did not apply to the conduct of foreign officials or when it could be set aside, it could be argued that States should refrain from prosecuting foreign officials if their State of nationality was able and willing to investigate criminal allegations itself, as long as there were no indications that such proceedings were a sham and only intended to avoid effective prosecution abroad. That would be an important safeguard to avoid politically motivated prosecutions, while still fighting impunity and promoting criminal responsibility, and one that could be developed by the Special Rapporteur in her seventh report.

In the case decided by the Court of Appeal of Lisbon, the defendant had claimed that he enjoyed immunity from Portuguese jurisdiction and had requested that the proceeding against him should be dismissed, and, alternatively, requested that his proceeding should be separated from proceedings against the other defendants and transferred to Angola. Although the Court of Appeal had upheld the decision of the court of first instance according to which the former Vice-President did not enjoy immunity from criminal jurisdiction in the proceedings in question, it had gone on to respond to the request to have the proceedings transferred to Angola.

The Court had had to decide whether the criteria for the transfer of a criminal proceeding in Portugal to a foreign State established by Act No. 144/99 had been fulfilled, namely the proper administration of justice and the social reintegration of the defendant in

the event of a conviction, and, accordingly, whether the proceeding could be transferred to Angola. The Court of Appeal of Lisbon concluded by ordering that the continuation of proceedings against the former Vice-President should be delegated to Angola.

The sixth report contained a relevant analysis of some of the topics that arose in the consideration of the procedural aspects of recognizing and applying immunity of State officials in foreign criminal jurisdictions. As she had mentioned, those topics tended to be absent from academic debates and were usually not detailed in international instruments dealing with immunity. However, there was relevant practice that would allow for determining certain rules concerning the procedural aspects of immunity. As the seventh report would continue the work begun in the sixth report and conclude with a proposal for a set of draft articles, a more complete analysis had to be postponed until the continuation of the debate on the topic at the following session.

Mr. Ruda Santolaria said that he wished to congratulate the Special Rapporteur on her clear and well-structured sixth report, which gave a useful account of the progress made and the discussions that had taken place within both the Commission and the Sixth Committee and began to address the procedural aspects of immunity from foreign criminal jurisdiction, a key issue that would be further developed in the seventh report.

With regard to the progress made thus far, he wished to highlight the work carried out with respect to the determination of the scope of the draft articles, which were without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law; the scope of immunity *ratione personae* for Heads of State, Heads of Government and Ministers for Foreign Affairs of immunity *ratione personae* with respect to acts performed, whether in a private or official capacity, during or prior to their term of office; and the scope of immunity *ratione materiae* for State officials with respect to acts performed in an official capacity. He also wished to underscore the development of a detailed list of serious crimes under international law in relation to which immunity *ratione materiae* did not apply, in accordance with the definition of such crimes in treaties explicitly mentioned in an annex that formed an integral part of the draft text.

In that connection, he underlined the mention in paragraph 17 of the sixth report of the need to strike a balance between the preservation of immunity as a guarantee of the principle of sovereign equality and the fight against impunity for the most serious crimes under international law, where the maintenance of unlimited immunity from jurisdiction *ratione materiae* could in practice lead to situations of impunity. Similarly, as indicated in paragraph 29 onwards, the procedural aspects of immunity from foreign criminal jurisdiction had been shown to be closely linked to the safeguarding and strengthening of immunity and the principle of the sovereign equality of States. At the same time, when considering situations in which immunity did not apply, it was critical to establish specific procedural conditions that ensured safeguards that protected both States and individuals.

A core issue emphasized by States and with which he fully agreed concerned the need to prevent the abusive or politically motivated exercise of foreign criminal jurisdiction. For that reason, the substantive aspects must be addressed in combination with procedural safeguards related to the limitations on and exceptions to immunity. The Special Rapporteur mentioned two central considerations in paragraphs 37 to 40 of the report: first, the need for procedural arrangements that would provide certainty to both the forum State and the State of the official, with a view to avoiding the possibility of jurisdiction being exercised over an official of a foreign State abusively or for political reasons and introducing an element of neutrality into the exercise and building trust between the two States, in addition to ensuring that a State official who might be affected by the exercise of foreign criminal jurisdiction enjoyed all of the procedural safeguards recognized under international law, in particular international human rights law; and secondly, the general statement to the effect that the jurisdiction of the State of the official took precedence over any foreign criminal jurisdiction.

He agreed with the Special Rapporteur in respect of a criterion of complementarity that there was in principle nothing to prevent the immunity of State officials from foreign criminal jurisdiction from being maintained and the primacy of the jurisdiction of the State of the official to prosecute crimes under international law allegedly committed by that

official from being ensured, provided that the exercise of such jurisdiction was effective. Thus, as the Special Rapporteur stated, efforts to combat impunity for the most serious crimes under international law would not be affected, in that immunity would serve as a mere procedural bar and international responsibility for the commission of the serious crimes would be deduced through the exercise of criminal jurisdiction by the State of the official.

He also agreed that immunity from jurisdiction must be considered by the competent organs of the forum State at an early stage in the process, at the earliest opportunity, before any judgment on the merits of the case was delivered and before binding measures were taken against a foreign official in judicial proceedings. With regard to whether immunity applied at the inquiry or investigation stage, he again agreed with the Special Rapporteur and her predecessor, Mr. Kolodkin, that it appeared impossible to conclude that such immunity must be taken into account and applied automatically right from the start of an investigation, although it would have to be considered when seeking to bring charges against the foreign official or to commit him or her for trial or in the case of interim measures during the investigation that could lead to summonses to appear or arrest warrants.

In relation to acts leading to the detention or arrest of a foreign official, a distinction should also be made between inviolability and immunity from criminal jurisdiction, since protection against detention stemmed from the former and not the latter. In that regard, the reference to the inviolability of Heads of State, Heads of Government and Ministers for Foreign Affairs as a rule of customary international law was very pertinent. Regarding appearance as a witness, he agreed that any binding measure by which a Head of State, Head of Government or Minister for Foreign Affairs was summoned to appear as a witness would be affected by immunity from foreign criminal jurisdiction, while, in the case of immunity *ratione materiae*, a summons to appear as a witness addressed to a foreign official would be affected by immunity only when it was binding and referred to acts performed in an official capacity. With regard to the determination of immunity, the references to the "suggestion of immunity" applied in the United States were particularly interesting, since the determination of immunity of certain foreign officials involved elements connected with the conduct of the State's foreign policy that should be clarified by the executive branch; the experiences of Austria and Spain, where under the legal framework courts could seek the opinion of public administration bodies to determine the applicability of immunity, was also of interest. It would be important to expand the analysis of State practice in the seventh report.

As concerned the future workplan, the sixth and seventh reports should be considered together, especially given that the draft articles based on those two reports would appear together given their close relationship. He hoped that it would be possible in 2019 to complete the review of the topic and to approve the set of draft articles on first reading.

Mr. Gómez-Robledo, after thanking the Special Rapporteur for her sixth report, said that the procedural aspects of immunity of State officials from foreign criminal jurisdiction were undoubtedly a matter of fundamental importance and he therefore agreed with the Special Rapporteur that the Commission should adopt a broad and comprehensive approach to the issue. However, it would not have been possible, as some members had requested, to have done so before dealing with all the questions that had been addressed in recent years and which were dealt with in the seven draft articles adopted by the Commission so far, in particular draft article 7, which referred to crimes under international law in respect of which immunity *ratione materiae* did not apply. He agreed that the definition of the concept of "criminal jurisdiction" was a very relevant issue that should not be disregarded. The review presented by the Special Rapporteur in the report would be very helpful in due course to the Drafting Committee in analysing the concept and reaching a conclusion on the matter.

As to when the immunity of State officials should be considered by the authorities of the forum State, he agreed that it should be at an "early stage in the process". However, that term was ambiguous and needed to be defined in more detail. The criterion noted by the Institute of International Law in its resolution on immunities from jurisdiction and execution of Heads of State and of Government in international law, stating that immunity

from jurisdiction should be considered "as soon as that status is known to [the authorities of the forum State]", was relevant to the consideration of the matter. In that case, the issue at hand was the status of the individual as a State official with the right to immunity. However, he agreed that it was more complex to use that criterion in the context of immunity *ratione materiae*, since the authorities would need to consider not only the person's status, as in the case of immunity *ratione personae*, but also the nature of the acts in question and the context in which they had been committed. Thus, mere knowledge of the person's status as a State official was not necessarily sufficient to trigger the obligation to respect immunity *ratione materiae*.

The decisions of the International Court of Justice on issues related to the matter at hand were relevant. First, account must be taken of the Court's advisory opinion on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, which stated that questions of immunity were preliminary issues which must be expeditiously decided *in limine litis*, *i.e.*, at the beginning of the process and before addressing the substantive issues. The Court further indicated that that statement was a "generally recognized principle of procedural law". Secondly, consideration should be given to the important criterion established by the Court in its decision in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* that immunity protected the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties. In other words, immunity applied when the act of authority of the State affected the functions of the State official. Similarly, it was highly relevant to take into account whether the act of authority of the forum State was constraining, as noted by the Court in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*.

As concerned the meaning of an "early stage in the process", it might be useful to apply by analogy the Court's interpretation, in the case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)*, of the phrase "without delay", referring to the obligation of the State to inform foreign nationals of their right to receive consular assistance. The Court noted that the term should not necessarily be interpreted as meaning "immediately upon arrest and before interrogation", but that the arresting authorities nevertheless had the obligation to fulfil their duty of information, as soon as it was realized that the person arrested was a foreign national or there were grounds to think that the person was probably a foreign national. In other words, criteria should be established that would allow it to be presumed that the forum State could not be unaware of the fact that the person was a foreign official who enjoyed immunity. In its consideration of the topic, the Committee should therefore take account of the criteria that: first, immunity should be considered without delay and in any case at the initial stage of judicial proceedings; and, second, that immunity should be considered before binding measures which could hinder the performance of official duties were taken in respect of a foreign official. Such measures would include but were not limited to: the bringing of a criminal charge, a summons to appear before the court as a person under investigation or to attend a confirmation of charges hearing, a summons to appear as the accused in a criminal trial, a detention order and an application to extradite or surrender a foreign official.

It might also be worth considering the possible participation of the executive authorities of the forum State in asserting immunities. In the case of Mexico, for example, the Ministry of Foreign Affairs, which was the State entity that had by far the most immediate interest in avoiding creating a dispute with the State of nationality of the official concerned, intervened before the court concerned to request that immunities should be respected. In the United States of America, he understood that it was the Department of State that would request the Department of Justice to take action, and the latter would, in turn, intervene before the court. If, on the other hand, the forum State had an interest in bringing the detained person to trial, it would hope that the State of the official would waive his or her immunity. In cases covered by draft article 7, it would also be up to the forum State to invoke the relevant exceptions. It would therefore be worth looking in greater detail at the participation of the executive authorities of the forum State and examining more thoroughly the issues already identified in chapter II, section D, of the report, on determination of immunity. In sum, although it was reasonable that the bodies with

jurisdiction over criminal matters should have the primary power to rule on immunity from criminal jurisdiction of a State official, other State bodies could have powers under national law to determine concurrently what should be done.

Other types of act that might not be of a criminal jurisdictional nature as such, but would undoubtedly affect the free exercise of the official duties of a State official, should be analysed. They would include detention in pursuance of an international legal cooperation and assistance mechanism or of a provisional arrest warrant for extradition purposes, which were acts issued by the judicial authorities of a third State. Such acts would not fall under the criminal jurisdiction of the State in question, which again underlined the importance of defining precisely what should be understood by "criminal jurisdiction".

In respect of the material element, he agreed with the analysis given in paragraphs 80 to 89 of the report concerning, among others, an order to make specific information available to a court on request. He thought, however, that the Commission should also examine the role that the United Nations Security Council could play in ordering a State to make certain information available to another State or a particular international body. Such a request would be more likely in respect of proceedings brought before the two international criminal tribunals established under Chapter VII of the Charter of the United Nations, namely the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, or any of the many existing hybrid tribunals. That did not, however, rule out a request for information being made in other situations involving the exercise of criminal jurisdiction at the national level. The facts of the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)* included the Security Council's decision to order Libya not only to extradite the alleged terrorists, but also to hand over the files related to the investigations that had been carried out at that time. In a joint statement (document S/23308 (1991)), the United States and the United Kingdom requested Libya "to disclose all it knows of this crime, including the names of all those responsible, and allow full access to all witnesses, documents and other material evidence, including all the remaining timers". The Security Council endorsed the request in its resolution 731 (1992). The role of the Security Council in ordering the submission of documents or the implementation of International Criminal Court arrest warrants in situations referred to the Court by the Council could not be overlooked. For instance, the referral to the Court of the situation in the Sudan and the non-implementation of the arrest warrant for President Al-Bashir should be analysed in the light of the practice of the Security Council and of the obligations of States parties to the Rome Statute.

He wished to draw the Commission's attention to the fact that the provisional agenda of the seventy-third session of the General Assembly included an item concerning a request for an advisory opinion of the International Court of Justice on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials. The inclusion of that item stemmed from a decision (EX CL/1068 (XXXII)) taken at the thirtieth ordinary session of the African Union in January 2018, in which the Assembly of the Union requested the African Group in New York to immediately place on the agenda of the United Nations General Assembly a request to seek an advisory opinion from the International Court of Justice on the question of immunities of a Head of State and Government and other senior officials as it related to the relationship between articles 27 and 98 of the Rome Statute and the obligations of States Parties under international law. As the item had appeared on the agenda of the General Assembly the previous week, it was important that the Commission should continue to follow its development carefully, as it could serve to shed more light on the issues that the Special Rapporteur was working on.

The Court's advisory opinion would certainly be extremely important to the topic, and it was equally clear that the Court would take account of the progress made on the topic, including, of course, the adoption of draft article 7.

In conclusion, he said that he agreed with the workplan and that he was pleased to note that the Planning Group had decided to recommend that the requisite number of plenary meetings and Drafting Committee meetings on the topic should be scheduled for

the following session. He wished to express his appreciation of the statement made by Mr. Nolte that morning, including a proposal that could restore harmony and might even lead to consensus within the Commission. However, he had been surprised at Mr. Huang's comments regarding the use of a vote, which, as regrettable as Mr. Huang might consider it, was one form in which the Commission could adopt decisions. Some persons might consider it to be a less preferable method, but that did not make the decisions so adopted any less legal or less legitimate. He was concerned whenever an attempt was made to show that the value of a consensus was qualitatively superior to that of a vote. In his view, that was not the case; indeed, much of the great progress that had been achieved in international law since the Second World War had been by means of votes, in exercise of *de lege ferenda*, and not always of *lex lata*, as demonstrated by the adoption of the 1969 and 1986 Vienna Conventions on the law of treaties and the United Nations Convention on the Law of the Sea. He thought that Mr. Nolte's proposal could help to restore a better atmosphere within the Commission and allow it to make progress on the basis of a more consensual position and perhaps even achieve, or at least approach, a certain degree of unity. That said, the Commission should have no cause whatsoever to regret what had been done at the previous session.

Mr. Murphy, after thanking the Special Rapporteur for her sixth report, said that he associated himself with the concerns raised by Mr. Murase, Mr. Hassouna and Mr. Huang about the timing of its submission. Indeed, while he had tried over the previous three days to study the report, he could only offer preliminary comments and, like others, would speak further during the debate at the Commission's next session.

For the time being, he would like to address two general points: one relating to the debate held in the Sixth Committee at the General Assembly's seventy-second session; and the second regarding procedural provisions and safeguards.

The summary of the debate in the Sixth Committee provided in paragraphs 13 to 20 was, in general, thoughtful and balanced. At the same time, he encouraged members who had not already done so to read both the Secretariat's summary of the debate and, even better, the verbatim statements that were available online. The statements made were often quite sharp and pointed in their tone, indicating in many instances considerable dissatisfaction with both the Commission's process, and the Commission's substance, with respect to draft article 7. A failure to be cognizant of that dissatisfaction would not bode well for a successful completion of the present topic. In that regard, he would like to address a few substantive points arising from his reading of that debate.

First, every speaker who had addressed the matter had agreed with the Commission's conclusion that there existed no exceptions for immunity *ratione personae*, as noted at paragraph 14 of the sixth report. It would seem that no State believed that the "values of the international community" superseded the immunity *ratione personae* of a foreign State official from national criminal jurisdiction. No State believed that there was a "trend" away from such immunity.

In that regard, he continued to find it curious that supporters of draft article 7 often pointed to the lack of immunity before the International Criminal Court to demonstrate both the "values" and "trend" arguments. Any lack of immunity before the Court was, of course, treaty based, and therefore could not be applied as a matter of law to non-parties. Yet even if one viewed the lack of immunity before the Court as relevant, that immunity covered all State officials, including Heads of State, Heads of Government and Ministers for Foreign Affairs. So, any claim that the lack of immunity before the Court was directly relevant to national criminal jurisdiction was strikingly selective: it apparently deemed the Court relevant for denying immunity *ratione materiae*, but deemed the Court irrelevant for immunity *ratione personae*. Such selectivity most certainly reflected policy preferences, not law.

In any event, and secondly, the most salient outcome of the Sixth Committee debate was the fact that the overwhelming majority of States did not regard draft article 7 as codification of existing law. As the Special Rapporteur noted, at paragraph 14 of the sixth report, just "one State maintained that a customary norm already exists". That was 1 State out of the 49 States that had spoken in the Sixth Committee. Not a single other State had

indicated that draft article 7 reflected customary international law and many had said the opposite.

Rather, as the Special Rapporteur herself indicated at paragraph 14, many supporters of draft article 7 — including Austria, Chile, Czechia, Greece, the Netherlands, Peru, Slovakia, Slovenia, South Africa and Spain — viewed draft article 7 as progressive development of the law. Thus, even those that supported it did not regard it as codifying the law.

Thirdly, as noted at paragraph 18 of the sixth report, many States had now asked the Commission to clearly establish whether a provision amounted to progressive development or to codification. They did not wish to see the Commission being vague on that point. Such States included Australia, Austria, France, Germany, India, Ireland, Israel, Poland, Singapore, Spain, Switzerland and the United Kingdom. For example, Australia had said that it was vital that, where the Commission elected to advance a proposal that did not reflect existing law, that proposal should be clearly identified as such. Switzerland had said that it believed that it was of paramount importance that an article on the exceptions to functional immunity of State officials from foreign criminal jurisdiction should be either solidly based in extensive and virtually uniform State practice and *opinio juris* or clearly labelled as a progressive development of the law.

Fourthly, virtually none of the States had accepted the list of crimes that appeared in draft article 7 as being a correct list. Indeed, only 2 States out of 49 had found the list satisfactory as it currently stood. Every other State had commented that there was something problematic with the list; either it had too many crimes or it had too few, or that the list should not exist at all. Three States specifically pointed out that the Commission had developed no apparent criteria for why some crimes were on the list, while others were not. That observation echoed a concern that had been repeatedly pointed out in the Drafting Committee and that the Commission should not continue to ignore.

The overall point was that the divergent views of States about the crimes at issue — over whether aggression or corruption should be included in the list or why slavery was not included — painted a picture of an area of international law that was very far from being settled.

As a general matter, it would be incumbent upon the Commission, if it sought to complete the first reading on that topic at the following session, to revisit draft article 7 and its commentary, in the light of the views expressed by States in the Sixth Committee. The legitimacy and strength of the Commission's work was drawn in large part from its responsiveness to the views of States. He noted that, with respect to both of its first readings at the current session, the Commission had undertaken revisions of its prior work in the light of the reactions of States.

Turning to the issue of procedural provisions and safeguards, he said that the sixth report indicated, in paragraph 22, that it was initiating, but not exhausting, consideration of the procedural aspects of immunity. To that end, it addressed just three procedural aspects: when immunity should be considered by the authorities of the forum State; the acts of the forum authorities that were affected by immunity; and the determination of immunity. No draft articles had been proposed for any of those procedural aspects.

As for many others, in the time available after issuance of the report the previous Friday, it had not been possible for him to analyse the part of the report dealing with procedural provisions and safeguards carefully, including the citations contained therein. As such, he would provide just one preliminary reaction, which was that the Special Rapporteur did not seem to be contemplating anything that would meaningfully address the politically motivated removal of immunities for official acts based on spurious allegations.

The key paragraph whereby the Special Rapporteur signalled her intentions with respect to procedures and safeguards was paragraph 41. In his view, that paragraph did not appear to envisage any procedures and safeguards that were meaningfully protective of State officials.

Paragraph 41 (a), which was analysed in the remainder of the report, seemed to be leaning towards the idea of "procedures" that merely indicated certain temporal aspects

regarding the point at which immunity issues arose. Those issues presented no obvious safeguards and the Special Rapporteur did not characterize them as such.

Paragraph 41 (b) seemed to be leaning towards merely acknowledging that States might invoke immunity and might waive immunity. That, of course, was true, but it was rather hard to see how that constituted a "first level" safeguard against abusive denial of the existence of immunity in a forum State.

Paragraph 41 (c) appeared to be leaning towards calling upon the forum State to be in communication with the State of the official, which was appropriate, but also did not appear to be much in the way of a safeguard. States typically were already in contact with one another when enforcement measures were being undertaken against an existing or former State official. So, while he favoured the Commission's saying something about such communication, he did not see how it addressed politically motivated or abusive allegations in a forum State.

Paragraph 41 (d) appeared to be leaning towards a provision that called for the State official to be accorded a fair trial. Again, that was appropriate; he favoured such a provision and had no problem with the Commission's stating something to that effect. However, it was in fact only reinforcing a human right that was to be accorded to all individuals at all times, and it could not be characterized as a safeguard unique to the removal of the immunity of a State official.

Furthermore, none of those paragraphs indicated any procedures or safeguards specific to the denial of immunity under draft article 7. Rather, the Commission appeared to be headed towards a series of anodyne procedures that provided no particular protection in situations where a former President or Minister for Foreign Affairs travelled abroad and was then arrested, interrogated and perhaps imprisoned on the basis of mere allegations that his or her prior official acts fell within the scope of draft article 7.

Accordingly, his sense was that the Commission might be headed in a direction of not having any meaningful "safeguards" with which to address either the denial of immunity of State officials generally or in the specific context of draft article 7. He found that regrettable, especially given that many members had insisted at the previous session that draft article 7 could be safely adopted because the Commission would develop safeguards in the future. He was, however, quite heartened by several concrete proposals made in the current debate, such as those made by Mr. Murase, Mr. Nolte, Mr. Grossman Guiloff, Mr. Šturma and Ms. Galvão Teles, that would constitute true safeguards; he hoped that the Special Rapporteur would seriously consider them as she prepared her next report.

Lastly, at paragraph 109, the Special Rapporteur indicated that she intended to analyse in her next report "matters relating to cooperation between States and international criminal courts and the possible impact of such cooperation on immunity from foreign criminal jurisdiction". He had some doubts about embarking on that path given that there were many different international criminal courts, at the global, regional and subregional levels, operating under different constituent instruments, which bound States in differing ways. Such an approach did not seem to fit the nature of the current topic, which was not focused on treaty regimes.

Ms. Oral said that she would like to congratulate the Special Rapporteur on her very well researched sixth report, the submission of which had unfortunately been delayed for reasons beyond the control of the Special Rapporteur. In view of the late issuance of the report, she would make only preliminary remarks at the current session and provide a more detailed statement when the Commission met the following year.

The topic of procedure in relation to immunity from foreign criminal jurisdiction had been examined by the Secretariat in its very comprehensive memorandum (A/CN.4/596) and by Mr. Kolodkin in his excellent third report (A/CN.4/646), both of which had been taken into account by the Special Rapporteur in the current report.

Mr. Kolodkin had focused on three key elements of procedure: timing, invocation of immunity and waiver of immunity. However, in her sixth report, the Special Rapporteur raised, in particular in paragraph 35 thereof, several more procedure-related questions that would have to be answered adequately by the Commission if its work on the topic was to

have its maximum effect. She agreed with the Special Rapporteur that the approach to the procedural aspects should be broad and comprehensive, as outlined in paragraph 41 of the report.

She recalled that in 2017, she had voted in favour of the adoption of draft article 7 on exceptions to immunity *ratione materiae*. In her statement at the time, however, she had also highlighted the importance of procedural rules and was therefore pleased that the Special Rapporteur would, in her seventh report, provide draft articles in that regard.

As noted by the Special Rapporteur in paragraph 23 of her report, the topic of immunity of State officials from foreign criminal jurisdiction had, in the literature, traditionally focused on the substantive dimension of immunity and given only peripheral consideration to the related procedural aspects. She fully agreed with the Special Rapporteur's statement in paragraph 24 of the report that the procedural aspects of such immunity could not be ignored and that their importance could not be underestimated. That included the importance of respecting the interests of the sovereign equality of States and the stability of inter-State relations. However, at the same time, the stability of inter-State relations could not always be a justification for allowing impunity for the most serious of international crimes. Those two interests, the sovereign equality of States and the stability of inter-State relations, could be balanced and, in her opinion, draft article 7 provided a sound approach in that regard and would be further strengthened with procedural rules.

In that light she agreed with the view as expressed in paragraph 37 that clear definitions of procedural aspects could provide certainty and stability to international relations, especially between the State of the official and the forum State. It was very important to have a procedural mechanism that would reduce as far as possible the possibility of jurisdiction being exercised over an official of a foreign State abusively or for political reasons or ends. She agreed that, in general, the beneficiary of procedural rules was the accused individual. However, she also understood that a distinguishing element of immunity related to foreign officials was the highly sensitive matter of the stability of international relations.

In her view, a distinction should be made between ensuring the fundamental procedural rights of the defendant under international human rights law, as stated by Mr. Murase, and protecting the stability of international relations and preventing, or at least minimizing, the misuse of draft article 7 for political reasons or other reasons unrelated to the search for justice and the prevention of impunity. In paragraph 39, the Special Rapporteur recognized the need for maintaining the balance between those two interests and also the need for procedural safeguards in relation to exceptions to immunity.

In her view, those were two separate objectives. Without question, any official accused of a criminal offence in a foreign jurisdiction should be ensured all the procedural rights required under international human rights law, assuming that immunity had either been waived by the State of the official or an exception had been recognized by the forum State. That should be one of the procedural requirements relating to the exceptions set out in draft article 7.

However, the second issue concerned procedural rules to prevent the misuse of draft article 7 by States. One of the arguments made against the exceptions to immunity contained in draft article 7 was the view that substantive justice should not be at the expense of procedural justice, which was an essential requirement for the rule of law. However, as she had stated the previous year, procedural justice was associated with fundamental rules of justice, which were non-derogable rules. However, that was not the case for immunity.

Article 27 of the Rome Statute was an example that reflected the derogable nature of immunity. Therefore, the procedural rules concerning the application of draft article 7 should take that into account and not necessarily be equated with those rules of procedure that represented fundamental rights, as they involved different standards. Nonetheless, issues related to when the determination of the application of draft article 7 came into play would be a key issue, given the consequences for the individual official in question and the other preliminary procedural matters related to investigations and communications with the State of the official. In that regard, evidentiary issues would also be important. Several

interesting suggestions had been made by colleagues, including requiring determination by high-level courts or even the executive branch. Mr. Nolte had made interesting proposals, as had Mr. Grossman Guiloff. However, she agreed with Mr. Murase's warning that the Commission should avoid creating a fragmentation of rules given the practice developed under the Rome Statute. She had full confidence that the Special Rapporteur would take all the suggestions made into account and present the Commission with a set of solid draft articles to work with.

As further information on State practice would be of great assistance to the Commission's work, she hoped that more States would be forthcoming in that regard. She supported and welcomed the future workplan set out in the report, which promised to be comprehensive in addressing many of the remaining issues to be considered concerning procedural aspects of immunity of State officials from foreign criminal jurisdiction.

Mr. Hmoud said that he wished to thank the Special Rapporteur for her excellent sixth report, which contained a careful analysis of the various procedural aspects of immunity, a matter closely associated with the substantive aspects of immunity of State officials. The report was only preliminary, containing a general discussion of the procedural guarantees and an analysis of the issue of the timing of consideration of immunity, the acts that were affected by immunity and the entities that determined immunity. He trusted, as the Special Rapporteur stated in the report, that the other dimensions relating to procedure, namely the invocation of immunity, cooperation and communication mechanisms between the forum State and the State of the official and procedural safeguards, would be tackled in 2019 in the seventh report. That report would contain suggested draft articles on the procedural aspects, which would allow the Commission to complete a first reading of the topic.

He would start by making general comments on the sixth report before turning to the procedural dimensions discussed therein. First, he would like to reaffirm the importance, for the successful conclusion of the topic, of the inclusion of procedural provisions and guarantees, as the issue was mainly regulated under the national laws of States and there was little practice under international law. Practice among States was diverse, with no single international instrument regulating procedures relating to the immunity of foreign officials. The suggested draft articles would thus serve to assist States in harmonizing their procedures relating to immunity and in strengthening cooperation, and also to clarify ambiguous aspects that had practical implications on the treatment of immunity under national jurisdiction.

The second general point was that procedure and procedural guarantees, while being of particular importance to the issue of limitations to immunity *ratione materiae*, went beyond that issue and had a significant effect on the all substantive aspects of immunity. Thus, the proposed draft articles should be comprehensive, tackling all dimensions relating to immunity.

Another matter to be considered was the definition of acts performed in an official capacity, the definition of an official and the scope of immunity *ratione materiae*. Such definitions played an important role in determining the applicability of various procedures to be proposed in the relevant draft articles. While an official might claim that he or she had been acting in an official capacity, the court of the forum State would have to determine, based on the relevant procedure, the status of the claimed immunity and the ensuing process. In the same vein, the court might have to determine whether the person involved was an official representing the State or exercising State functions. Such matters were usually determined by the State of the official based on its national laws, but the courts of the forum State might determine otherwise. As such, the procedure employed would play an important role in resolving such contentious matters between the two States.

The invocation of immunity had a practical substantive effect, especially in relation to immunity *ratione materiae*. That was because the State that claimed the immunity for its official for an act performed in an official capacity might incur international responsibility for such an act if were proven wrongful. It was important, therefore, that the proposed draft article should clarify the relationship between procedural invocation of *ratione materiae* and the consequences of such invocation.

Another general point related to the issue of sovereign equality. Indeed, the procedural aspects should strike a balance between the right of the forum State to exercise jurisdiction, the right of the State of the official not to be subject to the jurisdiction of another State and to be able to perform its sovereign functions and the right of the official to receive procedural guarantees in accordance with international human rights standards.

Turning to his final general point, he wished to stress that procedural guarantees should aim to protect all relevant parties, whether the official, the State of the official, or the forum State, from politically motivated proceedings or politicization. That point had been raised by members of the Commission, including himself, at the past two sessions, and in the Sixth Committee. Needless to say, to the extent that immunity *ratione materiae* did not exist, there would be politically motivated prosecutions that jeopardized the proper functioning of States and the performance by its officials of such functions. While procedural guarantees might go a long way in protecting against such prosecutions, they would not end such practices or attempts against the sovereignty of other States. It was therefore of utmost importance for the Commission to take that into account in drafting the relevant procedural draft articles relating to situations where immunity *ratione materiae* did not exist. In that regard, useful proposals had been made the previous year both within the Drafting Committee and during the informal consultation, which he would urge the Commission to consider in the context of discussions of the seventh report in 2019.

Turning to specific comments on the report, he agreed with the Special Rapporteur that the inclusion of a definition of criminal jurisdiction was important for several reasons. Not least was the fact that what would be included in the scope of criminal jurisdiction of the forum State would be subject to the legal regime on immunity and the associated procedural process. As explained in the report, if a certain act of the forum State was considered an exercise of jurisdiction, then that would determine the timing of the consideration of immunity and the triggering of such immunity. Such consideration by the forum State should be at an early stage, a matter that he had supported in his comments on the third report of Mr. Kolodkin. There was sufficient State practice that confirmed the existence of the principle. However, practice was diverse among national jurisdictions as to what constituted an early stage, and the Commission should strive to provide a substantive but practical meaning for that term. The key test, however, was that the timing of consideration of immunity should be associated with protecting the purpose of immunity and preventing abuse. Although outside the scope of the present topic, practice relating to the implementation of immunity under the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations and other conventional immunity regimes should provide useful guidance. How national courts and the executive treated such special immunities in terms of timing of consideration could play an important role in guiding the Commission on that matter. The draft articles should also guarantee that, once the status of immunity was known, the forum State must not be able to abuse its position regarding the applicability of the immunity regime. That was supported by the pronouncement of the International Court of Justice in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, when it had stated that the preliminary issue of immunity must be decided expeditiously and that that statement reflected a recognized general principle of procedural law intended to prevent the nullifying of the essence of immunity.

With respect to the meaning of consideration of immunity at an initial stage of judicial proceedings, he was not sure that early inquiry was not also covered. That, of course, depended on several factors, including the legal system of the forum State and whether it considered an inquiry to be part of the exercise of criminal jurisdiction, whether the inquiry involved certain coercive or other measures that might infringe upon the immunity in question and whether the inquiry involved more than one subject, who might or might not enjoy immunity. A related point was that the judiciary might not be the exclusive authority to decide on immunity at an early stage. That again depended on the legal system of the State and whether other bodies, including the executive and the prosecution, had that kind of authority.

Turning to the material element, he agreed with the basic test, which was whether the acts of the State against which immunity from criminal jurisdiction could be invoked

were coercive in nature. Another key element to be taken into account was whether the act against the official hindered the performance of the functions of the State of the official. That was the premise of immunity from foreign criminal jurisdiction that the International Court of Justice had consistently referred to in the *Arrest Warrant* case. As such, that should provide guidance in determining whether the act of the forum State violated such immunity. Detention and other measures of execution were inherently in conflict with the immunity of the State official from the criminal jurisdiction of the forum State, as they were both coercive in nature and infringed upon the proper functioning of the State of the official, who would otherwise enjoy immunity. A point related to detention was raised in paragraph 68 of the report namely the distinction between inviolability and immunity. While it was true that international instruments had treated them separately, the basic premise was the same, which was that they constituted a procedural bar against the exercise by the forum State of its criminal jurisdiction. For the purposes of the topic under consideration, no research had been done on the legal distinction between immunity and inviolability. He would welcome further analysis and research in future reports on whether the forum State could exercise jurisdiction but nevertheless be under the obligation to respect the inviolability of the official. While he understood the logic advanced by the Special Rapporteur in paragraphs 73 and 75 to distinguish between immunity *ratione materiae* and immunity *ratione personae* as they pertained to inviolability — assuming that the official's immunity *ratione materiae* had been established without limitation — he did not see how that person did not enjoy inviolability from detention or other measures restricting liberty.

Regarding appearance as a witness, he agreed that, unless special rules on immunity applied, an official did not enjoy immunity from testifying in the forum State's courts. Obviously, the test mentioned above applied also in that context. Serving as a witness should be voluntary and should not hamper the functions of the State of the official or violate that State's immunity under international law or the immunity and inviolability of its documents and other official material. That was true for both immunity *ratione personae* and immunity *ratione materiae*, although, in the latter case, the threshold might be higher.

The same applied to precautionary measures, where the above tests should be applied to determine the legality of the measure. In relation to immunity *ratione personae*, precautionary measures restricting the liberty and travel of the official were inconsistent with such immunity. He agreed with the Special Rapporteur that, as far as immunity *ratione materiae* was concerned, the situation was more nuanced and should be determined on a case-by-case basis, with the primary consideration being the disruption of the functions of the official's State by reason of such measures.

On the determination of immunity, which he had discussed above in a different context, he agreed that, generally, it was the court of the forum State that made a definitive determination but, again, it should be left to the national laws of that State to decide the matter. The executive might have an advisory role with respect to its national courts in determining the existence or lack of immunity. As such a role might be more than advisory and more determinative in nature, the Commission should adopt a flexible approach that reflected the primary role of the national courts of the forum State but also recognized that it might not be the exclusive authority. Obviously, in the context of immunity *ratione materiae*, and especially with respect to draft article 7, the role of the State of the official might be the key element in the determination of immunity. As mentioned earlier, that State might assert that the act had been carried out in an official capacity, which would establish its own legal consequences. Suggestions made by Ms. Galvão Teles, Mr. Murase and Mr. Nolte might be pertinent to the determination of such immunity and the application of its limitations. The forum State and the State of the official should also cooperate in determining on the basis of objective criteria whether the person was an official and whether the act was official.

Lastly, on the future programme of work, he looked forward to the Special Rapporteur's seventh report, which would contain the procedural provisions and guarantees and a discussion of the remaining procedural aspects, including invocation of immunity, waiver of immunity, cooperation and communication between the forum State and the official's State and the rights of the official. He hoped that the Commission would be able

to finish the remaining work on definitions in draft article 2 and other pending matters. He also hoped that the Commission would manage in the coming year to conclude its work on the substantive aspects relating to limitations to immunity *ratione materiae*, a matter that he had addressed in his statement on the Special Rapporteur's fifth report in 2016.

Mr. Zagaynov, thanking the Special Rapporteur for her sixth report, said that, like others, he regretted that it had been distributed at such a late date. The time to make a proper analysis and assessment of the document had consequently been very limited, especially in view of the complexity and sensitivity of the topic. He would thus offer only a few brief comments regarding primarily future work on the topic and leave open the possibility of speaking in greater detail about the content of the sixth report and the seventh report in 2019.

He fully shared the criticisms expressed by Mr. Huang regarding the Commission's work on the topic, including the approach to decision-making. The vote that had taken place the previous year should give the Commission cause for serious reflection. The departure from the practice of reaching consensus-based decisions and the failure to take account of the views of a significant number of Commission members could have a significantly adverse effect on future work. He agreed that, under the circumstances, it was necessary to continue efforts to reach a solution that would be acceptable to all.

Consideration of the topic of exceptions to the immunity of State officials from foreign criminal jurisdiction had led to deep rifts among members of the Commission. The debate in the Sixth Committee had shown that States were divided in their assessments. The position of a large number of delegations was based on the fact that there was currently no State practice to suggest the existence of or a trend towards a rule of customary law that would allow for exceptions to such immunity. He agreed with the view expressed by Mr. Nolte that the Commission should ascertain whether that was indeed the case. It was clear that many delegations in the Sixth Committee had been very concerned about the situation that had arisen, including the vote taken.

In the preparation of the next report and further work on the topic, the Special Rapporteur should take full account of the outcome of the discussions in the Sixth Committee in 2017 and 2018. As had been proposed by Mr. Murphy, the best option would be to return to work on the text of draft article 7. However, he took it from the statement of the Special Rapporteur that she had ruled out such an option. He would encourage her, nevertheless, to work towards overcoming the division among Commission members and delegations.

It would no doubt be logical to have provisions on procedural safeguards in the draft articles, and ideas on that issue should be given careful consideration. However, without going into the substance of the report, he doubted that a set of procedural guarantees would suffice to offset a formulation of such a conceptual and substantive nature as that contained in draft article 7.

In his view, expanding the scope of the topic to include issues concerning international criminal jurisdiction would not be helpful in overcoming the differences of views both within the Commission and among States. At the outset, when it had been proposed to include the topic in the Commission's long-term programme of work, questions concerning immunity from international criminal jurisdiction had been expressly ruled out. As indicated in paragraph 1 of provisionally adopted draft article 1, "the present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State". In the report, there were proposals to consider very complex issues on the obligation of States to cooperate with international criminal tribunals and courts and hand over foreign officials to such tribunals and courts that, in his view, went beyond the agreed framework and would lead to deeper rifts within the Commission. Therefore, the consideration of such aspects at the current stage would be counterproductive.

The Commission was currently at a crucial stage of its work on the topic of immunity, which could have far-reaching consequences. Further discussion within the Commission could deepen the rift or help it to overcome it, or at least prevent it from widening any further. By way of conclusion, he would like to express the hope that the

Special Rapporteur would lead the Commission along the latter path and to wish her every success in doing so.

Mr. Petrič said that, as many Member States in the Sixth Committee had expressed a need for caution in relation to the topic, he wished to urge both the Special Rapporteur and the Commission as a whole to take their concerns very seriously. The suggestions made by Mr. Nolte at the previous meeting could be helpful in that regard. A proposal from the Special Rapporteur for firm and clear procedural guarantees could also be a step in the right direction. He hoped that at its next session the Commission would have a clearer picture in that regard because, until it saw the proposed draft articles, it could not make a final decision, including, for his part, in relation to draft article 7.

Mr. Rajput said that he would like, in view of the lack of time that the members had had to examine the report, to ascertain the procedure that would be followed in respect of statements made during the current and the next sessions, particularly given that the debate in 2019 would concern both the sixth and the seventh reports, the latter containing the proposed draft articles. He presumed that the sixth and seventh reports would be discussed together, given that no draft articles were proposed in the sixth report and that the seventh report would contain proposed draft articles based on the analysis set out in the sixth and the seventh reports. He also hoped that it would be possible to receive the seventh report in a timely fashion, unlike the current year; members needed sufficient time to study, analyse and reflect on Special Rapporteurs' reports.

The Chair said that members who had made a statement on the report during the current session would also be permitted to speak on the topic the following year. Everyone would be given full opportunity to express their opinions. In line with the usual procedure, a summary of the debate would be included in the Commission's report on its work at the current session for submission to the General Assembly; similarly, a summary of the debate on the topic at the following session would be included in the corresponding report of the Commission.

Mr. Ouazzani Chahdi said that the discrepancies that had occurred in access by members of the Commission to the different language versions of the sixth report should be avoided in the future.

The Chair said that it was indeed important that the reports of Special Rapporteurs and other documents of the Commission should be made available to members in all the official languages of the United Nations. In the current instance, the Secretariat had gone to considerable lengths to ensure that the Special Rapporteur's sixth report was available in all official languages as soon as possible. In line with the Commission's established practice, the debate on the report had not commenced until the latter had been distributed in all six official languages. In course of that debate, it had been possible for 16 of the Commission's 34 members to make statements.

Ms. Escobar Hernández (Special Rapporteur) said that, because of translation capacity issues, some exceptions to the principle of multilingualism had been made in recent years, but that had not been the case during the current session. As a general rule, reports drafted by Special Rapporteurs were distributed, with the kind help of the Secretariat, on a provisional basis to all members to enable those able to do so to read them. However, no report had been debated until all the official language versions had become available.

Draft report of the Commission on the work of its seventieth session (*continued*)

Chapter VII. Provisional application of treaties (*continued*) (A/CN.4/L.920 and A/CN.4/L.920/Add.1)

C. *Text of the draft Guide to Provisional Application of Treaties, adopted by the Commission at its seventieth session*

The Chair invited the Commission to continue its consideration of the portion of chapter VII of the draft report contained in document A/CN.4/L.920/Add.1, beginning with the commentary to draft guideline 5.

Commentary to draft guideline 5

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

Mr. Nolte proposed that, in the first sentence, the words "concerns the triggering of" should be replaced with "defines".

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

The commentary to draft guideline 5 as a whole, as amended, was adopted.

Commentary to draft guideline 6

Paragraph (1)

Mr. Nolte said that the paragraph indicated that the source of the binding nature of provisional application was the treaty that was being provisionally applied, rather than the agreement to provisionally apply the treaty. However, the debate within the Commission had not been conclusive in that respect. He therefore proposed the deletion of the paragraph.

Mr. Murphy said that he basically agreed with Mr. Nolte's proposal, but suggested that the first sentence, which was largely descriptive, could be retained, perhaps by moving it to the current paragraph (2).

Mr. Gómez-Robledo (Special Rapporteur) said that he was not comfortable with the deletion of the second sentence, which was factual in nature.

Mr. Park said that he would favour retaining the first and second sentences and deleting the third.

Mr. Nolte said that he could agree to the deletion of only the third sentence.

The Chair said that he took it that the Commission wished to delete the final sentence of paragraph (1).

It was so decided.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

Mr. Nolte said that, in the first sentence, the word "previous" should be replaced with "general". In the same sentence, the words "or another agreement", which was the usual terminology in that context, should be added after the phrase "subject to the treaty". In the second sentence, the word "default" should be replaced with "presumption". Footnote 34 created the impression that all the treaties mentioned expressed a certain understanding of provisional application, but that was not the case. The treaties cited contained a clause on provisional application, but those clauses did not necessarily mention the effects of such application. He therefore proposed the deletion of words "see" and "which" in the first sentence and "while" in the second sentence so as to make the footnote simply a factual reference to a number of treaties that contained a reference to provisional application.

The Chair, noting the agreement of the Special Rapporteur to Mr. Nolte's proposal, said that he took it that the Commission wished to accept the proposed changes.

It was so decided.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Sir Michael Wood said that, unless they had been included by the Drafting Committee for a specific reason, the words "and to the conduct that is expected from States or international organizations that decide to resort to provisional application" in the second sentence should be deleted since the same point had already been made in the earlier part of the sentence.

Mr. Gómez-Robledo (Special Rapporteur) said that the phrase had been added to provide an explanation for the changes made to draft guideline 6, indicating that provisional application of treaties did not give rise to the full range of effects in the same way as if the treaty were in force and was thus more limited in scope. He had thought it important to allude to the conduct or attitude expected of States or international organizations when they decided to resort to provisional application of a treaty. He thought it useful, if not absolutely necessary, to include the phrase.

On a different point, Mr. Nolte had requested that the word "alludes" in the second sentence should be replaced with "refers". He was prepared to agree to that change, but would like to retain the wording at the end of that sentence that Sir Michael Wood had questioned.

The Chair said that he took it that the Commission wished to amend the paragraph as proposed by the Special Rapporteur.

It was so decided.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

Mr. Murphy said that footnote 35 should be updated to refer to the chapter on subsequent agreements and subsequent practice in relation to the interpretation of treaties in the Commission's report on its work at the current session.

Paragraph (6), as amended, was adopted.

The commentary to draft guideline 6 as a whole, as amended, was adopted.

Commentary to draft guideline 7

Paragraph (1)

Mr. Rajput said that the word "purporting" was used incorrectly and should be replaced with "intending".

Mr. Gómez-Robledo (Special Rapporteur) said that the wording had been reproduced from the definition of "reservation" contained in article 2 of the Vienna Convention on the Law of Treaties; its use had been insisted on during the Drafting Committee discussions.

Paragraph (1) was adopted.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

Paragraph (4)

Mr. Murphy said that the wording "invite further examination and discussion" in the second sentence was somewhat unusual, in that it raised the question of who would examine and discuss the rules of the 1969 Vienna Convention. He therefore proposed that the phrase should be replaced with the words "indicate the application of some, but not necessarily all".

Paragraph (4), as amended, was adopted.

Paragraph (5)

Sir Michael Wood said that, in the final sentence, the word "relatively" introduced an inappropriate nuance in English and that the remainder of the sentence dealt with an issue that had been avoided elsewhere, namely the distinction between the treaty that was being provisionally applied and the agreement to provisionally apply the treaty. He proposed that the sentence should be deleted.

Mr. Gómez-Robledo (Special Rapporteur) said that the wording in the Spanish version was clear.

Mr. Nolte said that the problem could be resolved by deleting the word "relatively". The distinction between the treaty that was being provisionally applied and the agreement to provisionally apply the treaty had been mentioned in paragraph (1) of the commentary to draft guideline 6, but the implication of that distinction had not been explained at that point.

Paragraph (5), as amended by Mr. Nolte, was adopted.

Paragraph (6)

Mr. Murphy said that, in the final sentence, the words "law of the international responsibility" were inappropriate and should be replaced with "internal rules"; the reservations that an international organization could make, mentioned in paragraph 2 of the guideline, might in part depend on the organization's internal rules.

Paragraph (6), as amended, was adopted.

The commentary to draft guideline 7 as a whole, as amended, was adopted.

Commentary to draft guideline 8

Paragraph (1)

Mr. Nolte said that, in the second sentence, the words "the application of" should be deleted. In the third sentence, the phrase "would necessarily constitute a wrongful act" should be reworded to read "necessarily constitutes a wrongful act" in order to make the statement stronger. While the information given in the final sentence was important, the second part thereof did not follow automatically from the first. Accordingly, the sentence should be divided into two sentences to read: "Article 73 of the 1969 Vienna Convention states that its provisions shall not prejudge any question that may arise in regard to a treaty from the international responsibility of a State and article 74 of the 1986 Vienna Convention provides similarly. The scope of the draft guidelines is not limited to that of the two Vienna Conventions, as stated in draft guideline 2."

Sir Michael Wood said the words "is considered as being" should be deleted from the third sentence.

Mr. Murphy said that, in the second sentence, the word "if" seemed to call the legally binding nature of provisional application into question and should be replaced with "since"; the remainder of the sentence should be adjusted to reflect the language of draft guideline 6 so that the first clause of the sentence would read: "Since the treaty or part of the treaty being provisionally applied produces a legally binging obligation,".

Paragraph (1) was adopted with those amendments and minor editorial amendments.

Paragraph (2)

Sir Michael Wood said that the phrase "as conceived under the present draft guideline" was unclear and should be deleted.

Mr. Rajput said that, for the sake of clarity, the words "a breach of" should be inserted between "it is only" and "that part of".

Mr. Gómez-Robledo (Special Rapporteur) said that he could go along with that amendment, which would require the deletion of the phrase "in case of a breach".

Paragraph (2) was adopted with those amendments.

Paragraph (3)

Paragraph (3) was adopted.

The commentary to draft guideline 8 as a whole, as amended, was adopted.

The meeting rose at 6 p.m.